

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Licensing Order
Issued to Huepenbecker Construction,
Inc., and Lloyd Huepenbecker,
individually

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on March 13, 2012, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The record closed at the conclusion of the hearing that day.

Christopher M. Kaisershot, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (Department). Lloyd Huepenbecker (Respondent) appeared for himself and Huepenbecker Construction, Inc., without counsel.

STATEMENT OF THE ISSUES

1. Did Respondents demonstrate that they are untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under a license when they billed a homeowner for amounts owed on an alleged oral contract, in violation of Minn. Stat. §§ 326B.082, subd. 11(b)(9), 326B.809(b), and 326B.84(5) and (15) (2010)?¹

2. Did the Respondents engage in deceptive or dishonest practices or demonstrate themselves to be untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under a license when they sued the homeowner seeking to collect lost profits on an alleged oral contract, in violation of Minn. Stat. §§ 326B.082, subds. 11(b)(8) and (9), 326B.84(2), and (15)?

3. Did the Respondents demonstrate that they are untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under a license by providing false or misleading information to the commissioner in response to an information request, in violation of Minn. Stat. §§ 326B.082, subd. 11(b)(2) and (9), and 326B.84(14) and (15)?

¹ All references to Minnesota Statutes are to the 2010 edition.

4. Was the Commissioner's penalty assessment reasonable?

The Administrative Law Judge concludes that in seeking to collect lost profits on an alleged oral contract, the Respondents demonstrated untrustworthiness. The Administrative Law Judge concludes, however, that the Respondents did not provide false or misleading factual information to the commissioner. The penalty imposed on Respondents was reasonable and reflected the statutory factors.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent Huepenbecker Construction, Inc., has been a licensed residential building contractor since 1992. The company specializes in storm damage repairs. Lloyd Huepenbecker is the company's qualifying person. Mr. Huepenbecker lives in Waconia, Minnesota.²

2. Robert and Kelly Green live next door to Mr. Huepenbecker. Their homes are separated by one empty lot.³

3. In the spring of 2009, several neighbors, including Mr. Huepenbecker and the Greens, were having a social gathering around a firepit in the driveway of another neighbor. During the gathering, Mr. Green asked Mr. Huepenbecker to look at the roof over his porch, because water had flowed through a recessed light during a recent storm. A few days later Mr. Huepenbecker looked at the roof and advised Green that he saw no construction defects but that there might be hail damage to the shingles from a storm the previous fall. He told Mr. Green that he should call his insurance company to report possible damage, and said he would be happy to meet with the adjuster.⁴

4. Mr. Green called his insurance company and arranged for Mr. Huepenbecker to meet the adjuster. The adjuster agreed that there was hail damage and that the roof should be replaced. Mr. Huepenbecker told the Greens that he would do the work for the amount of the insurance proceeds but could not make time for it until the fall.⁵

5. The Greens received a check from their insurance company shortly thereafter for the roof.⁶

6. In August 2009 the Greens obtained written estimates from several contractors for replacement of the roof. They also asked Mr. Huepenbecker for a

² Testimony of Lloyd Huepenbecker; Ex. 14.

³ Testimony of Robert Green.

⁴ Test. of R. Green.

⁵ *Id.*

⁶ *Id.*

written estimate. When they did so, Mr. Huepenbecker became angry and said he had agreed to do the work for the insurance proceeds and would not provide a written estimate unless they gave him the estimate from the insurance company.⁷

7. In August 2009, the Greens executed a written contract with M & M Construction, another building contractor who was doing work in the neighborhood. The work on their roof was completed in the spring of 2010.⁸

8. The fact that the Greens had hired a contractor other than Mr. Huepenbecker became a topic of conversation in the neighborhood.⁹

9. When the roofing work was completed, Mr. Huepenbecker sent the Greens a bill from his company in the amount of \$6,750 for “amount owed on roof as per our agreement.” This sum represented Mr. Huepenbecker’s calculation of lost profit on the job.¹⁰

10. The Greens ignored the bill. In May 2010, Mr. Huepenbecker filed a claim against them in Carver County Conciliation Court. The complaint alleged that the Greens “agreed to have me roof their house for the insurance estimate price if I met with the adjuster and got him to pay for it.”¹¹ The conciliation court referee ordered dismissal of the complaint on the basis of Minn. Stat. § 326B.809(a), which requires all agreements between licensed contractors and customers to be in writing. Regardless of what may have been agreed to orally, the court found the alleged contract to be unenforceable.¹²

11. Through an attorney, Mr. Huepenbecker appealed the dismissal of his claim to district court. In his amended complaint, he asserted a number of non-contract based claims against the Greens, including fraud, equitable estoppel, promissory estoppel, and constructive trust.¹³

12. In March 2011, the district court ordered summary judgment for the Greens and dismissed the complaint, finding again that the alleged oral contract was not enforceable under equitable theories.¹⁴

13. In June 2011, the Greens filed a complaint about Mr. Huepenbecker with the Department. They indicated that defending the litigation commenced by Mr. Huepenbecker cost them \$4,000 in attorney’s fees.¹⁵

⁷ *Id.*

⁸ Test. of R. Green.

⁹ Test. of L. Huepenbecker.

¹⁰ *Id.*; Ex. 1.

¹¹ Ex. 2.

¹² Ex. 3.

¹³ Ex. 5.

¹⁴ Ex. 8.

¹⁵ Ex. 9; Ex. 12.

14. On June 6, 2011, the Department wrote to Mr. Huepenbecker asking him for a detailed written explanation for why Minn. Stat. § 326B.809 did not apply to him; why he should be paid for representing the Greens in dealing with their insurance company; and why he pursued litigation in this matter despite the statutory requirement to have all contracts reduced to writing.¹⁶

15. Mr. Huepenbecker hired a different attorney to respond on his behalf. In the response, the attorney indicated that Mr. Huepenbecker was acting as an expert in dealing with the Greens' insurance company, a service that did not require licensure; that he had performed work and deserved compensation for it; and that he had relied on the advice of counsel in pursuing litigation against the Greens.¹⁷

16. On September 1, 2011, the Department issued a Licensing Order to the Respondents imposing a \$5,000 monetary penalty for failing to reduce the contract to writing, billing or filing lawsuits without discernible rationale and proper evidentiary support, and filing false or misleading information with the Department. The Licensing Order also requires Respondents to cease and desist from further violations of law. The Respondents filed a timely appeal.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charges against Respondent under Minn. Stat. §§ 14.50 and 326B.082, subd. 8.

2. The Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. The burden of proof is on the Department to show by a preponderance of the evidence that Respondent's license as a building contractor is subject to discipline for billing a homeowner for amounts due on an alleged oral contract, using legal process to collect lost profits on an alleged oral contract, and providing false or misleading information on the license application.¹⁸

5. All agreements including proposals, estimates, bids, quotations, contracts, purchase orders, and change orders between a licensee and a customer for the performance of a licensee's services must be in writing and must contain the following: (1) a detailed summary of the services to be performed; (2) a description of the specific materials to be used or a list of standard features to be included; and (3) the total

¹⁶ Ex. 10.

¹⁷ Ex. 11.

¹⁸ Minn. R. 1400.7300, subp. 5.

contract price or a description of the basis on which the price will be calculated.¹⁹ Before entering into an agreement, the licensee shall provide a prospective customer with written performance guidelines for the services to be performed. Performance guidelines also must be included or incorporated by reference in the agreement. All agreements shall be signed and dated by the licensee and customer.²⁰

6. The commissioner may deny, suspend, limit, place conditions on, or revoke a person's license if the commissioner finds that the person fails to comply with any law, rule, or order related to the duties and responsibilities entrusted to the commissioner or has performed work or conducted the person's affairs in a manner that demonstrates incompetence, untrustworthiness, or financial irresponsibility.²¹

7. The Department has proved by a preponderance of the evidence that the Respondents failed to reduce the alleged contract with the homeowners to writing and then improperly sought to collect lost profits on the oral contract, thereby demonstrating untrustworthiness, in violation of Minn. Stat. §§ 326B.809, 326B.082, subd. 11(b)(9), and 326B.84(5) & (15).

8. The Commissioner may deny, suspend, limit, place conditions on, or revoke a person's license or registration if the commissioner finds that the person has submitted false or misleading information to the state in connection with the application for the license or registration,²² or the person has conducted himself or herself in a manner that demonstrates incompetence, untrustworthiness, or financial irresponsibility.²³

9. The Commissioner has failed to prove by a preponderance of the evidence that the Respondent submitted false or misleading factual information in connection with the investigation into this matter. The Respondents' response to the department included legal argument but did not include false statements of fact.

10. A licensing order may include an assessment of monetary penalties of up to \$10,000 for each violation or act, conduct, or practice committed by the person.²⁴

11. In determining the amount of a penalty assessed under this provision, the commissioner shall take the following factors into account: the willfulness of the violation, the gravity of the violation, the history of past violations, the number of violations, the economic benefit gained by the person committing the violation, and other factors that justice may require.²⁵

¹⁹ Minn. Stat. 326B.809(a).

²⁰ Minn. Stat. 326B.809(b).

²¹ Minn. Stat. § 326B.082, subd. 11(b)(9); Minn. Stat. 326B.84(5) & (15).

²² Minn. Stat. § 326B.082, subd. 11(b)(2).

²³ Minn. Stat. § 326B.082, subd. 11(b)(9).

²⁴ Minn. Stat. § 326B.082, subd. 12(b).

²⁵ Minn. Stat. § 326B.083, subd. 1; Minn. Stat. § 14.045, subd. 3(a).

12. The Commissioner's penalty assessment is reasonable based on these factors.

Based on the above Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED THAT: the Commissioner affirm the Licensing Order issued to Huepenbecker Construction, Inc., and Lloyd Huepenbecker, individually, except for the findings and conclusions regarding the filing of false or misleading information with the Department.

Dated: April 30, 2012

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally Recorded

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Labor and Industry (the Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Ken Peterson, Commissioner, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155 (651) 284-5126 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.